Great Eastern Life Assurance (M) Bhd v Prakasa Rao a/l Samachulu

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(NCC)(W)-212–05 OF 2018
AHMADI ASNAWI, ABDUL KARIM AND SURAYA OTHMAN JJCA
26 JULY 2019

Insurance — Life insurance — Claim for total and permanent disability benefits — Whether plaintiff's injury fell within purview of total and permanent disability ('TPD') — Whether the case of Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu [1992] 1 MLJ 249 had binding effect upon this present case — Whether plaintiff suffered bodily injury which resulted in permanent total disablement as defined in policies — Whether plaintiff entitled to TPD benefits under policies

The appellant was an insurance company and was the defendant in the original suit at the sessions court. The respondent was the insured party under a life insurance policy by the appellant and was the plaintiff in the original suit. The plaintiff had claimed from the defendant for what was commonly known in the insurance industry as a claim for 'total and permanent disability' ('TPD') benefits. Between the years 1999–2008, the plaintiff had subscribed to a total of 11 life insurance policies provided by the defendant. Under those policies, he would be entitled to claim for TPD benefits to the total amount of RM746,700, the amount of which, in the High Court and also before the Court of Appeal, was not in dispute. The plaintiff's claim was dismissed by the learned sessions court judge ('SCJ') and his appeal against the said decision to the High Court was allowed. Briefly, the plaintiff claimed to be a self-employed mechanic, running his own motor workshop. On 14 April 2010, he had an accident while working at this workshop and suffered an injury to his neck. The subsequent course of events culminated in his claim for TPD benefits arising from the said insurance policies. On 26 April 2011, the defendant received the plaintiff's claim for the TPD benefits and thereafter, by a letter dated 14 June 2012, the defendant rejected the plaintiff's claim on account that the plaintiff's alleged condition did not fall within the policy definition of 'total and permanent disability' as provided by the said insurance policies. Hence, the plaintiff's action at the sessions court. The learned judicial commissioner ('JC') had reversed the decision of the sessions court, apparently based solely upon the decision of the Supreme Court in *Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249 ('*Kathirvelu*'s case'). It was submitted by the defendant that *Kathirvelu*'s case had no binding effect upon this case and the definition of 'total and permanent disability' must be interpreted in the context and construction of the terms in the policy; unlike the *Kathirvelu*'s case, the

A disability referred to in the policies subscribed to by the plaintiff was not confined to his ability to return to his original occupation, but rather his ability to do any work at all. Learned counsel for the plaintiff on the other hand submitted that the medical evidence showed that the plaintiff had no possibility of making a full recovery and returning to his occupation as a B mechanic and that the learned JC was right in relying on the decision in the *Kathirvelu*'s case.

Held, dismissing the appellant's appeal with costs of RM20,000 here and below; and affirming the decision of the JC:

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(1) What amounted to TPD would be subject to and dependent upon the definition of TPD in the policy contract. The sustainability of the plaintiff's case would stand or fall upon whether the plaintiff was totally and permanently disabled in accordance with the definition of TPD as D provided for under the policies. The policy definition for TPD under the policies purchased by the plaintiff were almost identical (see paras 14–15).

(2) Meanwhile, Policy No 9456261–5 and Policy No 1000058454–6 provided a further alternative definition where TPD was also a state of E incapacity which rendered the insured disable to such an extent as to be totally and permanently unable to perform at least three of the listed activities of daily living even with the use of mechanical equipment, special devices or other aids and adaptation used by disable persons. The word 'permanent' means beyond the hope of recovery with current F medical knowledge and technology (see para 16).

(3) The policy in a separate interpretation section defined permanent total disablement as 'absolute disablement from engaging in or giving attention to profession or occupation of any kind'. It was apparent that in the instant case, the plaintiff cannot rely on the alternative meaning of G TPD in respect of irrecoverable loss of sight of both eyes or either one nor on the loss of use of both limbs or either one of them. Nor could the plaintiff rely on the further alternative meaning of TPD Policy Nos 9456261–5 and 1000058454–6 on account of non-production of H evidence that he was totally and permanently unable to perform at least three of the listed activities of daily living even with the aid of mechanical equipment or special devices or other aids used by disable persons (see paras 21 & 23–24).

(4) The court was not bound by the decision in *Kathirvelu*'s case, contrary to I the view of the learned JC, who opined that she was bound by the decision in the said case, for the simple reason that the definition of TPD therein and in the instant case were differently worded. Nevertheless, there were common distinguishing characteristics in both the definitions. In the instant case, the incapacity must be total and permanent,

preventing the insured from doing or engaging sufficiently in any work, occupation or profession to earn wages or compensation or profit. Whereas in *Kathirvelu*'s case it envisaged a situation where there was absolute disablement from engaging in or giving attention to a profession or occupation of any kind (see paras 27–28).

(5) The learned SCJ found that the evidence showed that the plaintiff, due to the injury suffered by him, could not return to his work as a mechanic but was able to do other kind of work or engaged in other occupation, physically less consuming. Likewise, the learned JC found that the plaintiff was working as a mechanic prior to the accident and evidence suggested that he could not work as a mechanic after the accident but that he could do work of a supervisory or administrative in nature, and based on *Kathirvelu*'s case, the plaintiff had indeed suffered from TPD in accordance with the provisions of the policies purchased by him. Upon perusal of the evidence adduced and having particular regard to the medical evidence, the court was on all fours with the findings of both the learned SCJ and JC that the plaintiff had been incapacitated from going back to his former occupation as a mechanic on account of the injury suffered by him in the accident (see paras 33–34).

[Bahasa Malaysia summary

Perayu adalah syarikat insurans dan adalah defendan dalam saman asal di mahkamah sesyen. Responden adalah pihak yang menerima insurans di bawah polisi insurans hayat oleh perayu dan adalah plaintif di dalam saman yang asal. Plaintif telah menuntut daripada defendan untuk apa yang lebih biasa dikenali di dalam industri insurans sebagai tuntutan untuk faedah-faedah 'total and permanent disability' ('TPD'). Di antara tahun-tahun 1999–2008, plaintif telah melanggan kepada sejumlah 11 polisi insurans hayat oleh defendan. Di bawah polisi-polisi ini, beliau layak untuk menuntut kepada faedah-faedah TPD kepada jumlah keseluruhan RM746,700, jumlah yang di mana, di Mahkamah Tinggi dan juga sebelum Mahkamah Rayuan, tidak dipertikaikan. Tuntutan plaintif telah ditolak oleh hakim mahkamah sesyen ('HMS') dan rayuan beliau terhadap keputusan tersebut ke Mahkamah Tinggi adalah dibenarkan. Secara ringkasnya, plaintif mengatakan beliau adalah bekerja sendiri, menjalankan bengkel motor beliau sendiri. Pada 14 April 2010, beliau telah mengalami kecederaan semasa bekerja di bengkelnya dan mengalami kecederaan di leher beliau. Kejadian seterusnya menjurus kepada tuntutan beliau untuk faedah-faedah TPD yang berbangkit daripada polisi insurans tersebut. Pada 26 April 2011, defendan menerima tuntutan plaintif untuk faedah-faedah TPD and selepas itu, melalui surat bertarikh 14 Jun 2012, defendan menolak tuntutan plaintif atas dasar bahawa keadaan plaintif yang dikatakan tidak jatuh di dalam definisi polisi 'total and permanent disability' sepertimana yang diberikan oleh insurans polisi tersebut. Oleh itu, tindakan plaintif di mahkamah sesyen. Pesuruhjaya kehakiman ('PK') telah mengubah

keputusan mahkamah sesyen, secara jelasnya hanya berdasarkan keputusan Mahkamah Agung di *Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249 ('kes *Kathirvelu*'). Ia adalah dihujahkan oleh defendan bahawa kes *Kathirvelu* tiada apa-apa kesan terikat di kes ini dan definisi 'total and permanent disability' haruslah diterjemahkan dalam konteks dan konstruksi terma-terma di dalam polisi; tidak seperti kes *Kathirvelu*, ketidakupayaan yang dirujukkan kepada polisi-polisi yang dilanggan oleh plaintif tidak hanya terhad kepada keupayaan beliau untuk balik kepada pekerjaan asal, tetapi berkaitan dengan keupayaannya untuk membuat apa-apa kerja pun. Peguamcara terpelajar untuk plaintif pada lawannya menghujahkan bahawa keterangan perubatan menunjukkan bahawa plaintif tiada kemungkinan untuk pulih sepenuhnya dan berbalik kepada pekerjaan sebagai mekanik dan bahawa PK yang terpelajar adalah berhak dalam menyandar kepada keputusan kes *Kathirvelu*.

Diputuskan, menolak rayuan perayu dengan kos RM20,000 di sini dan di bawah; dan menegaskan keputusan PK:

(1) Apa yang menjadikan TPD tertakluk dan bergantung kepada definisi TPD di dalam polisi kontrak. Kelestarian kes plaintif akan berdiri atau jatuh di mana sama ada plaintif adalah secara keseluruhannya dan secara kekal tidak berupaya mengikut definisi TPD yang diberikan di bawah polisi. Definisi polisi untuk TPD di bawah polisi-polisi yang dibeli oleh plaintif adalah seakan-akan serupa (lihat perenggan 14–15).

(2) Sementara itu, No Polisi 9456261-5 dan No Polisi 1000058454–6 memberikan definisi alternatif selanjutnya di mana TPD merupakan juga keadaan tidak upaya yang membuatkan penerima insurans tidak berupaya sehingga beliau secara keseluruhannya dan berkekalan tidak mampu untuk melaksanakan sekurang-kurangnya tiga aktiviti-aktiviti harian yang tersenarai walaupun dengan menggunakan peralatan mekanikal, alatan-alatan istimewa atau apa-apa bantuan lain dan adaptasi yang digunakan oleh orang-orang kurang upaya. Perkataan 'kekal' bermaksud lebih daripada harapan untuk pulih dengan pengetahuan perubatan yang terkini dan teknologi (lihat perenggan 16).

(3) Polisi di dalam seksyen terjemahan terasing mendefinisikan ketidakupayaan keseluruhan yang kekal sebagai 'ketidakupayaan langsung daripada menarik atau memberikan perhatian kepada kerjaya atau apa-apa jenis pekerjaan'. Ia adalah jelas bahawa di dalam kes ini, plaintif tidak boleh bersandar kepada maksud alternatif TPD dari segi kehilangan upaya melihat kedua matanya yang tidak boleh dipulihkan atau salah satu atau pada kehilangan kegunaan kedua-dua anggota atau salah satunya. Plaintif juga tidak boleh bersandar pada maksud alternatif lanjut TPD dalam polisi No 9456261–5 dan 1000058454–6 atas dasar tiada pengeluaran keterangan bahawa beliau adalah secara

keseluruhannya dan secara kekalnya tidak boleh untuk menjalankan sekurang-kurangnya tiga aktiviti-aktiviti harian yang tersenarai walaupun dengan bantuan peralatan mekanikal atau alat-alat istimewa atau apa-apa bantuan lain yang digunakan oleh orang-orang kurang upaya (lihat perenggan 21 & 23–24).

(4) Mahkamah tidak terikat dengan keputusan kes *Kathirvelu*, berlawanan dengan pandangan PK yang terpelajar, yang memberikan pandangan bahawa beliau terikat dengan keputusan kes tersebut, untuk alasan yang mudah bahawa definisi TPD di sini dan di dalam kes ini adalah dikatakan secara berbeza. Walau bagaimanapun, terdapat karakter yang sama yang membezakan kedua-dua definisi. Di dalam kes ini, ketidakupayaan mestilah secara keseluruhan dan berkekalan, menghalang penerima insurans daripada membuat atau melibatkan diri secara cukup di dalam apa-apa kerja, pekerjaan atau profesion untuk mendapat gaji-gaji atau pampasan atau keuntungan. Di dalam kes *Kathirvelu* ia melibatkan situasi di mana terdapat ketidakupayaan langsung atau memberi perhatian kepada profesion atau apa-apa jenis pekerjaan (lihat perenggan 27–28).

(5) HMS yang terpelajar mendapati bahawa keterangan menunjukkan bahawa plaintif, oleh kerana kecederaan yang dialaminya, tidak boleh balik kepada kerja beliau sebagai mekanik tetapi masih boleh membuat jenis kerja lain atau membuat pekerjaan lain, secara fizikal atau kurang penat. Seperti yang sama, PK yang terpelajar mendapati bahawa plaintif bekerja sebagai mekanik sebelum kemalangan dan keterangan mencadangkan bahawa beliau tidak boleh kerja sebagai mekanik selepas kemalangan tetapi beliau boleh membuat kerja penyeliaan atau pentadbiran secara semulajadinya, dan berdasarkan kepada kes *Kathirvelu*, plaintif telah jelas mengalami TPD menurut kepada kandungan polisi-polisi yang dibeli oleh beliau. Dalam menggunakan keterangan yang diberikan dan memandangkan keterangan perubatan, mahkamah setuju dengan penemuann-penemuan kedua-dua HMS dan PK terpelajar bahawa plaintif telah tidak berupaya untuk balik kepada pekerjaan lamanya sebagai mekanik atas dasar kecederaan yang dialami oleh beliau di dalam kemalangan (lihat perenggan 33–34).]

Notes

For cases on life insurance in general, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 254–287.

Cases referred to

Pacific & Orient Insurance Co Sdn Bhd v R Kathirvelu [1992] 1 MLJ 249; [1992] 1 CLJ Rep 251, SC (consd)

Andrew Teh (Tan Chong Pei and Azura Abrar with him) (Wong Lu Peen & Tunku Alina) for the appellant.
Venkateswara Kandasamy (M Ravendran & Assoc) for the respondent.

Ahmadi Asnawi JCA:

THE BACKGROUND OF THE CASE

[1] The appellant is an insurance company and is the defendant in the original suit at the sessions court. The respondent is the insured party under a life insurance policy provided by the appellant and is the plaintiff in the original suit. Both of the parties will hereinafter be referred to respectively as the plaintiff and the defendant.

[2] The plaintiff had claimed from the defendant for what is commonly known in the insurance industry as a claim for 'total and permanent disability' ('TPD') benefits. Between the years 1999 until 2008, the plaintiff had subscribed to a total of 11 life insurance policies provided by the defendant. Under those policies, he would be entitled to claim for TPD benefits to the total amount of RM746,700, the amount of which, in the High Court and also before us, is not in dispute.

[3] The plaintiff's claim was dismissed by the learned session court judge ('SCJ') and his appeal against the said decision to the High Court was allowed. Thus, the appeal before us by the defendant.

[4] It should be noted from the outset that the only issue in this appeal and also in courts below is this: whether or not the plaintiff had suffered a 'total and permanent disability' ('TPD') as defined under the said life insurance policies, and thus entitled to the TPD benefits under those policies amounting to a total sum of RM746,000?

THE BRIEF FACTS

[5] The plaintiff claimed to be a self-employed mechanic, running his own motor workshop. Between the years 1999–2008, he had subscribed to a total of 11 life insurance policies provided by the defendant. On 14 April 2010, he had an accident while working at his workshop and suffered an injury to his neck. The subsequent course of events culminated in his claim for TPD benefits arising from the said insurance policies.

[6] On 26 April 2011, the defendant received the plaintiff's claim for the TPD benefits and thereafter, by a letter dated 14 June 2012, the defendant rejected the plaintiff's claim on account that the plaintiff's alleged condition

does not fall within the policy definition of 'total and permanent disability' as provided by the said insurance policies. Hence, the plaintiff's action at the session court.

[7] A total of 13 witnesses had testified, five of whom are doctors ie PW2 (Dato Dr Ramanathan @ Manickam a/l Ramiah); PW5 (Dr Raveendran a/l S Kandiah); PW6 (Dr Anbanandan a/l S Subramaniam); PW7 (Professor Vickneswaran a/l Mathaneswaran); and DW5 (Dr Harwant Singh a/l Hacharan Singh Tara). Their testimonies were summarised by the learned JC at pp 22–30 of her grounds of judgment, *Bahagian* A, *Jld* 1, *rekod rayuan* ('RR').

DECISION OF THE SESSION COURT

[8] The decision of the learned SCJ is best encapsulated through the following excerpts of the judgment (at paras 16–24 of the grounds of judgment, *Bahagian* D, *Jld* 3A *RR*):

> [16] Setelah saya meneliti keterangan saksi-saksi kedua belah pihak, eksibit-eksibit yang dikemukakan, laporan-laporan perubatan ke atas plaintif dan hujahan bertulis kedua belah pihak, saya memutuskan di tahap imbangan kebarangkalian plaintif telah gagal untuk membuktikan tuntutannya. Berdasarkan keterangan yang ada, saya mendapati plaintif telah gagal membuktikan beliau mengalami hilang upaya kekal (TPD) seperti yang ditakrifkan di bawah polisi insurans tersebut.
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> [17] Di bawah takrifan polisi-polisi insurans tersebut, untuk berjaya di dalam tuntutannya, plaintif perlulah membuktikan yang dia tidak boleh melakukan apa-apa kerja akibat dari kecederaan yang dialaminya atau pun dia telah mengalami kecederaan yang tidak boleh disembuhkan yang menyebabkan dia tidak boleh melakukan tiga dari aktiviti harian yang dinyatakan di bawah polisi tersebut walaupun dengan bantuan alat-alat bantuan. Dengan lain perkataan, kehilangan upaya kekal di bawah polisi ini tidak hanya merujuk kepada ketidakbolehan plaintif kembali ke pekerjaan asalnya. Ianya merangkumi ketidakupayaan plaintif untuk melakukan apa-apa kerja.
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> [19] Keterangan yang ada hanya menunjukkan plaintif tidak boleh kembali bekerja sebagai mekanik akibat kecederaan yang dialaminya. Di bawah polisi insurans tersebut keadaan ini adalah tidak memadai untuk membolehkan plaintif mendapat faedah hilang upaya kekal di bawah polisi-polisi insurans tersebut.
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> [24] Berdasarkan semua keterangan-keterangan ini, saya berpendapat plaintif telah gagal untuk membuktikan dia mengalami kehilangan upaya kekal seperti yang ditakrifkan di bawah polisi-polisi insurans yang dikeluarkan oleh defendan. Keterangan yang ada hanya menunjukkan plaintif hanya tidak boleh kembali bertugas sebagai mekanik akibat dari kecederaan yang dialaminya. Oleh yang demikian, tuntutan plaintif adalah ditolak dengan kos sebanyak RM20,000.

DECISION OF THE HIGH COURT

[9] The learned judicial commissioner ('JC') had reversed the decision of the session court, apparently based solely upon the decision of the Supreme Court in *Pacific & Orient Insurance Co Sdn Bhd v R Kathirvelu* [1992] 1 MLJ 249; [1992] 1 CLJ Rep 251 ('*Kathirvelu*'s case'). We reproduce here in extenso the relevant parts of the judgment of the learned JC (at paras 38–42 of the grounds of judgment, at pp 40–42, *Bahagian* A, *Jld* 1, *RR*) for purposes of clarity:

> 38. However, I am of the view that the sessions court judge had erred in one respect. He did not consider the decision of the Supreme Court in *Pacific & Orient Insurance Co Sdn Bhd v R Kathirvelu* [1992] 1 MLJ 249; [1992] 1 CLJ Rep 251 where it was held as follows:
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> > As for the plaintiff's incapacity due to the injury, we would prefer to follow *Pocock*'s case and looking at the whole policy hold that the definitions section therein, in particular that clause defining permanent total disablement as 'absolute disablement from engaging in or giving attention to profession or occupation of any kind', should be understood in the context of the actual business or occupation of the plaintiff. Moreover it is quite clear from the evidence in this case that the plaintiff would never again be able to resume his occupation as a technical assistant in the Jabatan Kerja Raya and was therefore permanently and totally disable (sic) within the meaning of the policy.
> >
> > Having considered the evidence and the submissions of counsel on the first issue, we would agree with the learned judge's finding that the bodily injury suffered by the plaintiff was solely and independently caused by the two accidents in the sense that they were the proximate cause of his permanent total disablement in this case and had prevented him from continuing this occupation as a technical assistant in the Jabatan Kerja Raya.
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> 39. The above said decision is binding on this court. The actual occupation of the plaintiff is that of a mechanic. The sessions court judge found that to be the case. His Honour also found it to be the case that the evidence shows that the plaintiff could not return to his work as a mechanic. Based on the said case of *Pacific & Orient Insurance*, the sessions court judge ought to be held [sic] that the plaintiff had suffered a TPD.
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> ...
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> 41. Notwithstanding the medical evidence that the plaintiff is not precluded from carrying out work which is supervisory or administrative in nature, there is also no evidence led by the defendant as to exactly what, if any, job the plaintiff could actually carry on. To say merely that the plaintiff could give orders to his workers in the workshop from a wheelchair and is therefore not suffering from TPD is not logical. A person could not be said to attend to business simply because he was capable of doing, perhaps rather badly, some minor part of the work involved in that business (see *Pocock v Century Insurance Company Ltd* [1960] 2 Lloyd's Report 150).
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> 42. Due to the aforesaid reasons, I am of the view that the sessions court judge had

erred in dismissing the claim of the plaintiff. In the circumstances, I allow the appeal and grant judgment in favour of the plaintiff as prayed in his claim with costs of RM5,000 subject to allocator. The parties have confirmed that if liability is in favour of the plaintiff, the quantum of his claim is not in dispute.

THE SUBMISSIONS BEFORE US

[10] Learned counsel for the defendant had submitted before us, inter alia, as follows:

(a) the learned JC had erred in fact and in law in deciding that the plaintiff is totally and permanently disabled, in spite of the medical and other evidence to the contrary; despite keeping up an appearance of being wheelchair bound and attached to wearing a neck brace, the plaintiff had been observed by witnesses to have been able to walk and feed for himself unaided, and there was evidence that traffic summons had been issued against him as the driver of a motorcar; the learned JC thus erred in finding that the plaintiff is wheelchair bound;

(b) the learned JC had erred in fact and in law in deciding that the plaintiff was totally and permanently disabled based on the decision in *Kathirvelu*'s case. It was submitted that *Kathirvelu*'s case has no binding effect upon this case, based on the following grounds:

(i) the insurance policy in *Kathirvelu*'s case is a 'personal accident policy' whereas the present case deals with multiple 'life insurance policy'; and

(ii) the definition of 'total and permanent disability' under the two insurance policies are different; and

(c) the definition of 'total and permanent disability' must be interpreted in the context and construction of the terms in the policy; unlike the Kathirvelu's case, the disability referred to in the policies subscribed to by the plaintiff is not confined to his ability to return to his original occupation, but rather his ability to do any work at all.

[11] Learned counsel for the respondent on the other hand submitted that:

(a) the medical evidence showed that the plaintiff has no possibility of making a full recovery and returning to his occupation as a mechanic; and

(b) the learned JC was right in relying on the decision in *Kathirvelu*'s case.

OUR DECISION

[12] As the learned JC had departed from the finding of the learned SCJ on the issue of what constitutes TPD based upon the ruling in *Kathirvelu*'s case,

which she opined is binding upon the lower courts, and consequent thereto, since the learned SCJ had found it to be the case that the evidence shows that the plaintiff could not return to his former work as a mechanic, the learned SCJ then ought to have ruled that the plaintiff had indeed suffered TPD, it is hence imperative upon us to look at the definition of TPD assigned by the insurance policies purchased by the plaintiff.

[13] The plaintiff had purchased the following life insurance policies from the defendant:

(i) Policy No 7694051–0 commencement date 25 November 1999;

(ii) 81663109 26 September 2001;

(iii) 8527833–4 11 July 2002;

(iv) 8667266–9 23 December 2002;

(v) 87687351 28 April 2003;

(vi) 87687351 28 April 2003;

(vii) 9120991–0 27 February 2004;

(viii) 9120991–0 27 February 2004;

(ix) 9456261–5 22 March 2005;

(x) 100058454–6 30 June 2008; and

(xi) 100058454–6 30 June 2008.

[14] What amounts to TPD will be subject to and dependent upon the definition of TPD in the policy contract. The sustainability of the plaintiff's case would stand or fall upon whether the plaintiff is totally and permanently disabled in accordance with the definition of TPD as provided for under the policies.

[15] The policy definition for TPD under the policies purchased by the plaintiff are almost identical. In a nutshell, it provided for a state of incapacity which:

(i) is total and permanent and such that there is neither then nor at any time thereafter any work, occupation or profesion that the life assured can ever sufficiently do or follow to earn or obtain any wages, compensation or profit; or

(ii) is deemed to be caused by total and irrecoverable loss of both eye sight, loss of use of two limbs at or above the wrist or ankle or total and irrecoverable loss of sight of one eye and loss of use of one limb at or above the wrist or ankle.

[16] Meanwhile, Policy No 9456261–5 and Policy No 1000058454–6 (items (ix) and (x) of para 13, above) provided a further alternative definition where TPD is also a state of incapacity which renders the insured disable to such an extent as to be totally and permanently unable to perform at least three of the listed activities of daily living even with the use of mechanical equipment, special devices or other aids and adaptation used by disable persons. The word 'permanent' means beyond the hope of recovery with current medical knowledge and technology.

[17] Accordingly, 'activities of daily living' as provided by the policies means:

(a) getting in and out of chair without physical assistance;

(b) the ability to move from room to room without physical assistance;

(c) the ability to voluntarily control bowel and bladder functions and to maintain personel hygiene;

(d) dressing and undressing;

(e) bathing and washing one's self; and

(f) eating.

[18] Unlike the instant case before us, the insurance policy referred to in *Kathirvelu*'s case was a personal accident policy.

[19] As can be digested from the citation, the personal accident policy taken by the respondent in *Kathirvelu*'s case provided, inter alia, for the payment to the respondent of a sum of RM200,000 on the terms and conditions contained in the policy. It stated that:

> if during the period of insurance the insured shall sustain any bodily injury caused by violent external and visible means which injury shall solely and independently of any other cause result in his death or disablement the company will pay to the insured or to his legal personel representatives the sum or sums of money in accordance with the table of benefits set forth in the schedule.

[20] One of the issues raised in the said case during the trial was: has the plaintiff/respondent suffered bodily injury which has resulted in permanent total disablement as defined in the policy?

[21] The policy in a separate interpretation section defined permanent total disablement as 'absolute disablement from engaging in or giving attention to profession or occupation of any kind'.

[22] On appeal, the then Supreme Court ruled that:

A As for the plaintiff's incapacity due to the injury, we would prefer to follow *Pocock*'s case and looking at the whole policy hold that the definition section therein, in particular that clause defining permanent total disablement as 'absolute disablement from engaging in or giving attention to profesion of any kind', *should be understood in the context of the actual business or occupation of the plaintiff*. Moreover it is quite clear from the evidence in this case that the plaintiff would never again be able to resume his occupation as a technical assistant in the Jabatan Kerja Raya and was therefore permanently and totally disable within the meaning of the policy'. (Emphasis added.)

C **[23]** It is apparent that in the instant case, the plaintiff cannot rely on the alternative meaning of TPD in respect of irrecoverable loss of sight of both eyes or either one nor on the loss of use of both limbs or either one of them.

D **[24]** Nor can the plaintiff rely on the further alternative meaning of TPD under policies No 9456261–5 and 1000058454–6 on account of non-production of evidence that he was totally and permanently unable to perform at least three of the listed activities of daily living even with the aid of mechanical equipment or special devices or other aids used by disable persons.

E **[25]** The plaintiff's only recourse is to prove his total and permanent in-capacity to ever sufficiently do or engage in any work, occupation or profession to earn or obtain any wages, compensation or profit.

F **[26]** In the event, how is the said clause, as enumerated in para 15(i) above, to be interpreted or construed?

[27] We do not think that we are bound by the decision in *Kathirvelu*'s case, contrary to the view of the learned JC, who opined that she is bound by the G decision in the said case, for the simple reason that the definition of TPD therein and in the instant case were differently worded.

[28] Nevertheless, there were common distinguishing characteristics in both the definitions. In the instant case, in a nutshell, the incapacity must be total H and permanent, preventing the insured from doing or engaging sufficiently in any work, occupation or profession to earn wages or compensation or profit. Whereas in *Kathirvelu*'s case it envisages a situation where there was absolute disablement from engaging in or giving attention to a profession or occupation of any kind.

I **[29]** In our view, in both the definitions, though worded differently, the paramount underlying consideration is the total and permanent or absolute disablement of the insured to do or engage in any work, occupation or profession. The two definitions carried the same ultimate meaning that the

insured is incapacitated from doing any work, occupation or profession due to the injury or injuries sustained by the insured. A

[30] Hence, the next issue is what kind of work, occupation or profession is envisaged or anticipated in the context of the surrounding circumstances? Does it revolve around the incapacity of the plaintiff to do or engage in just about any other kind of work as suggested by the learned SCJ or his incapacity to return to his former work as a mechanic (in his own workshop) as found by the learned JC, based on *Kathirvelu*'s case? B

C

[31] Having regard to the fact that the underlying consideration of the definition of TPD in the instant case is the total and permanent disability to do or engage in any work occupation or profession, almost akin to the definition in *Kathirvelu*'s case, we found the decision in *Kathirvelu*'s case very persuasive and would thus associate ourselves with the said decision and unequivocally find that the clause or definition therein 'should be understood in the context of the actual business or occupation of the plaintiff'. Hence, the incapacity to do or engage in any work or occupation must relate to the plaintiff's former or actual occupation. It must thus be related to his incapacity to work in his former occupation as a mechanic. After all as the evidence shows, that was the only job the plaintiff had ever done all his life. D E

[32] Hence, the corresponding issue for determination is whether the plaintiff had suffered bodily injury which has resulted in the permanent and total disability or incapacity of the plaintiff to do or engages in any work, occupation or profession in accordance with the provisions of the policies purchased by him. F

[33] The learned SCJ found that the evidence shows that the plaintiff, due to the injury suffered by him, could not return to his work as a mechanic but is able do other kind of work or engage in other occupation, physically less consuming. Likewise the learned JC found that the plaintiff was working as a mechanic prior to the accident and the evidence suggests that he could not work as a mechanic after the accident but that he could do work of a supervisory or administrative in nature, and based on *Kathirvelu*'s case, the plaintiff had indeed suffered from TPD in accordance with the provisions of the policies purchased by him. G H

[34] Upon perusal of the evidence adduced and having particular regard to the medical evidence, we are on all fours with the findings of both the learned SCJ and JC that the plaintiff has been incapacitated from going back to his former occupation as a mechanic on account of the injury suffered by him in the accident. Hence, pursuant to our ruling enumerated in paras 28–31, above, we are in agreement with the learned JC's finding that the plaintiff had indeed I

suffered from TPD in accordance with the policies purchased by him. We would unhesitantly associate ourselves with the sentiments expressed by the learned JC as reiterated below:

> 41. Notwithstanding the medical evidence that the plaintiff is not precluded from carrying out work which is supervisory or administrative in nature, there is also no evidence led by the defendant as to exactly what, if any, job the plaintiff could actually carry on. To say merely that the plaintiff could give orders to his workers in the workshop from a wheelchair and is therefore not suffering from TPD is not logical. A person could not be said to attend to business simply because he was capable of doing, perhaps rather badly, some minor part of the work involved in that business. (see *Pocock v Century Insurance Company Ltd* [1960] 2 Lloyd's Report 150).

[35] In addition, we opined that it is of no relevance that the insurance policy referred to in *Kathirvelu*'s case was a personal accident policy. What is of relevance is the purport of the definitions of TPD in both the insurance policies (in the instant case and in *Kathirvelu*'s case) which we have duly concretised in the preceding paragraphs.

CONCLUSION

[36] We dismissed the appellant's appeal for the reasons enumerated above in its entirety with cost, assessed at RM20,000 here and below. The decision of the learned JC is hereby affirmed.

Appeal dismissed with costs of RM20,000, decision of learned judicial commissioner affirmed.

Reported by Addibah Adnan